Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

Richard S. Waring, Joseph T. Waring, Melinda P. Waring,
Petitioners,
v.

UMLIC-NINE CORP., a North Carolina corporation,
Respondent,

On Petition for Writ Of Certiorari
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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65 pp

Questions Presented For Federal Question Certification Pursuant to 28 U.S.C. ¶1254(A)

1. Can the six year Federal statute of limitation in FIRREA 12 U.S.C.1821 (d) (14) be reset or stacked each time the FDIC changes conservator or receiver.

2. Does resetting the statute of limitations combined without any meaningful discovery for the benefit of the defendant violate the due process clause of the Fourteenth amendment of the Constitution of the United States?

List of Parties To This Proceeding

Pursuant to Rule 14.1(b) of the Rules of the Supreme Court of the United States, the petitioner files this certificate as to parties and others who may have an interest in the outcome of this case:
Parties
Petitioners are Richard S. Waring, Joseph T. Waring, and Melinda P. Waring, defendants in the District Court.

Respondents, Plaintiffs in the District Court and Appellees on appeal, are the UMLIC-NINE CORP., a North Carolina Corporation.
Lipan Springs Development corporation, a Texas corporation; the Waring children's irrevocable trust; Karen Sheaffer, as public trustee of Eagle County, Colorado and all occupants or other unknown persons who claim any interest in the subject matter of this action, may also have an interest in the outcome of this case.

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Opinions Below

Civil Action 96-B-2495 in The United States District Court for the District of Colorado having not found case law that addresses the issue of this case issued an opinion based on legislative intent and policy considerations. The court concluded that the statute of limitations is reset each time the FDIC or RTC is appointed as receiver or conservator and this action was filed within the applicable statute of limitations.

Civil action 98-1193 & 98-1228. Cited as 168 F.3d 1173(10th Cir ~~1999) In an order~~ issued on February 16, 1999, the United States Court of Appeals for the 10th Circuit affirmed on appeal the orders of the District Court.
Richard S. Waring, petitioner appearing pro se, filed a petition in civil action 98-1228 for panel rehearing and petition for rehearing en banc of the Tenth Circuit Court of Appeals affirmation of the order of summary judgment by U.S District Court in defense of claims filed by UMLIC-Nine Corp. (UMC)(Plaintiff). On April 15, 1999 the U.S. Court of Appeals for the 10th Circuit issued an order that denied the rehearing and en banc request.

Statement for the basis of jurisdiction in this court.

Statutory Provisions

The jurisdiction of the Supreme Court of the United States is conferred by 28 U.S.C. ¶1254(a)1 and/or 28 U.S.C. ¶21012 to review cases in the courts of appeals by writ of certiorari upon the petition of any party of any civil case before or after rendition of judgment or decree.
Constitutional and Statutory Provisions

FIRREA Statute 12 U.S.C. $1821 (d) (14) provides :

(A) Not with standing any provisions of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be-

(i) in the case of any contract claim, the longer of-
(ii) the 6-year period beginning on the date accrues; or
(iii) the period applicable under State law

(B) For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of-
(i) the date of the appointment of the Corporation as conservator or receiver; or
(ii) the date on which the cause of action accrues.

Fourteenth Amendment to the Constitution of the United States

Statement of the case

On June 20, 1986, Lipan Springs Development Corporation (Lipan Springs), a Texas corporation, executed and delivered a promissory note (Note) payable to Federated Savings and Loan Association (Federated) in the original principal amount of $250,000. As partial security for the Note, appellants executed a deed of trust encumbering a condominium unit located in the Booth Falls Mountain Homes condominium development in Eagle County, Colorado (Colorado property). As primary security Lipan Springs secured the note by executing a deed of trust encumbering a property in Travis County, Texas (Texas property). Initially, the Note was to become due and payable in full on June 20, 1987. By written agreement executed effective June 20, 1987, the term of the Note was extended to June 20, 1988, with all remaining principal and interest due on that date. Lipan Springs defaulted on the Note and deed of trust, as extended, by

failing to pay the principal and interest due June 20, 1988. The Note remains unpaid.

On August 19, 1988, the Federal Home Loan Bank Board (FHLBB) declared Federated, the obligee on the Note, insolvent. The FHLBB appointed the Federal Deposit Insurance Corporation (FDIC), acting through the Federal Savings and Loan Deposit Insurance Corporation (FSLIC), receiver for Federated. Acting as receiver, the FSLIC then transferred Federated's assets, including the Note, to Sunbelt Savings, FSB (Old Sunbelt) itself under receivership.

On April 25, 1991, the director of the Office of Thrift Supervision (OTS) appointed the FDIC, acting through the Resolution Trust Corporation (RTC), receiver for Old Sunbelt. On the same date, the OTS chartered a new institution, Sunbelt Savings, FSB (New Sunbelt); transferred from the then current receiver to it all of Old Sunbelt's assets, including the Note; and appointed the RTC conservator for New Sunbelt. On April 9, 1992, the OTS replaced the RTC as conservator for New Sunbelt by appointing RTC receiver for New Sunbelt.

In 1995, UMLIC's predecessor in title acquired the Note from RTC. The Note and the deeds of trust were assigned to UMLIC on February 22, 1996. UMLIC filed this action on October 25, 1996. The district court granted summary judgment for UMLIC on its complaint, rejecting appellants' argument that this action is barred by the statute of limitations and on appeal by petitioners the order of the District court was affirmed by the the 10th Court of Appeals.

Jurisdiction in Court of First Instance

The United States District Court for the District of Colorado had jurisdiction pursuant to 28 U.S.C. 1331 and 1343 to adjudicate all relevant facts and issues of this action.

Reasons For Granting Writ

The petitioners, Richard S. Waring, Joseph T. Waring, and Melinda P. Waring petition the Supreme Court of the United States, pursuant to 28 U.S.C. 1254(a) to review the final order of the United States Court of Appeals for the 10th Circuit. The U.S. Court of Appeals for the 10th Circuit has entered into a decision in conflict with a decision by the U.S. Court of Appeal for the 5th Circuit on the same federal statute. The 5th Circuit Court of Appeals in FDIC v. Bledsoe 989 F. 2d 805,807 (5th Cir 1993) and subsequent cases involving the FDIC and FIRREA 1821 (d)(14) has clearly stated or implied that FDIC or RTC does not have the legal right to reset the statute of limitations. The Court of Appeals for the 10th Circuit has also made a decision on this important federal question that also conflicts with relevant opinions of the U.S. Supreme Court. The 10th Circuit's opinion goes contrary to the Supreme Court opinion in O'Melveny and Meyers v. FDIC 114 S Ct. 2048 (1994) and United States, Petitioner v. Chris w. Beggerly, et al (1998) 141 l ED 2d 32 no. 97-731. The court in its opinion stated that the FDIC does not necessarily always win and must look to state law to interpret federal statute. It also conflicts with cases on statute of limitations by the Court that recognize the important issues of repose and stale claims. The plaintiff filed their claim over eight years after the cause of action and first receivership. In the U. S District Court, discovery regarding the note in question was so minimal due to lost files and pertinent documents over time. The District Court ignored the Supreme Court's opinions on stale claims and rights of repose in such significant cases as Johnson v. Railway Express Agency, 421 U. S. 454, 463-64 (1975) Wilson v. Garcia 471 U.S. 261,282 (1985) Board of Regents v Tomanio (1980) 446 U.S. 478, 64 L Ed 2d 440,100 S Ct 1790 .The decision by the District Court and affirmed by the appellate court also violates the due process clause of the Fourteenth amendment of the Constitution. Neither the Court nor the

respondents in their briefs have shown that the FDIC had a compelling government interest to require the resetting of the accrual of the statute of limitations. Without this compelling interest the decision by the lower courts violated due process and individual rights of the petitioners. The lower courts decision has given greater rather than equal protection under the law to a governmental agency, FDIC. In its most recent term the Court, in Saenz v. Roe 98-97 in discussing Article I and Congress's broad power to legislate, stated, "those legislative powers are, however limited not only by the scope of the Framers" affirmative delegation, but also by the principle "that they may not be exercised in a way that violates other specific provisions of the Constitution". The Court further states that the Fourteenth amendment grants "Congress no power to restrict , abrogate, or dilute these guarantees". In a much earlier opinion in this century the Court stated, "Where a federal statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, the U.S. Supreme Court's duty is to adopt the latter; it is out of respect for Congress, which is assumed to legislate in the light of constitutional limitations, that the court adhere to this principal, which has so long been applied by the Court that the principal is beyond debate." United States ex rel. Atty General v. Delaware & Hudson Co. 213 U.S. 366,408,53 L. Ed 836,29 S Ct. 527.

The petitioners have no other adequate means to obtain the relief they seek. The district court's order and affirmance by the 10th Circuit Court of appeals is clearly erroneous as a matter of law and their judicial interpretation of the law.

Petitioners Joseph T. Waring and Melinda Waring and Richard S. Waring have a meritorious reason for the U.S. Supreme Court to grant certiorari in this case. Contrary to the memorandum and order by the U.S. District Court and Plaintiff's contention in its original petition, defendants deny that the claim under default of a promissory note that matured

June 20, 1988, is valid Defendants agree that the defining statute in this case is the Federal Statute of Limitations found in 12 U.S.C. $ 1821 (d) (14) and assert that the six year Federal Statute of Limitations has run and plaintiff is therefore time barred from seeking action. Additionally, plaintiff's claim the majority of the files were misplaced during the various travels of FSLIC, RTC or FDIC and were not available for discovery. Defendants inability to produce, through discovery, the very important release provisions granted to them by the original association, Federated Savings & Loan Assn., was both actual and presumptive prejudice caused by the significant passage of time. The due process clause of the 14th admendment of the US Constitution was violated and the case should be dismissed for prejudice.

The defendants request that the U.S. Supreme Court consider the conclusion of the U.S. District Court on the validity of the Court's opinion of FDIC's right of resetting of the six year statute of limitations by applying the statute 12 U.S.C. $ 1821 (e). We believe the District Court erred in the conclusion that the FDIC has the right to independently repudiate and reset the statute of limitations. Additionally, petitioners request the U.S. Supreme court dismiss the case as the failure of the repondent/appellant to have access to exculputory records in the lost files created a prejudice to the facts of the case.

A. Summary of Argument

Pursuant to 12 U.S.C. 1821(d) (14) UMLIC had six years from the later of the date of Waring's default (June 20, 1988) or the date FSLIC was appointed receiver for Federated Savings and Loan Association (FSLA) (August 19,1988) to bring this action. Accordingly, limitations on UMLIC claim expired on August 19, 1994. This suit, however was not commenced until October 25, 1996.

The controlling FIRREA Statute 12 U.S.C. $1821 (d) (14) provides :

(A) Not with standing any provisions of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be-

(iv) in the case of any contract claim, the longer of-
(v) the 6-year period beginning on the date accrues; or
(vi) the period applicable under State law

(B) For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of-
(iii) the date of the appointment of the Corporation as conservator or receiver; or
(iv) the date on which the cause of action accrues.

The dates as undisputed facts of this case are:
June 20, 1988- note executed under the provisions of laws of the State of Texas matures, under the ownership of Federated Savings (a state chartered savings &. Loan assn.)
August 19,1988- Federated Savings fails and the Federal Savings and Loan Insurance Corporation (FSLIC) is appointed as Receiver and on the same day FSLIC assigned the assets of Federated to Sunbelt Savings FSB, an institution created by FSLIC from eight failed state savings institution in receivership including Federated Savings and Sunbelt Savings .Sunbelt Savings and Loan, a Texas chartered Savings and Loan Association, was placed into receivership on August 19, 1988 by FSLIC and pursuant to an acquisition agreement between FSLIC as receiver for FSLA and receiver for Sunbelt Savings, FSB , substantially all the assets were acquired by Sunbelt Savings , FSB, Dallas, Texas., August 9, 1989- Financial Institutions Reform Recovery and Enforcement Act (FIRREA) was enacted by Congress which contains the applicable statute 12 U.S.C.(1821) (d) (14).
April 25, 1991- Sunbelt Savings FSB, the institution formed from failed state institutions and under RTC Receivership is

administratively reorganized and rechartered as Sunbelt Federal Savings FSB with RTC as Receiver and then Conservator. April 9, 1992 RTC administratively by authority of OTS replaced the conservator with RTC as receiver to liquidate the institution. Sunbelt Federal Savings, FSB March 13, 1996 UMLIC-NINE Corp. files a non-judicial foreclosure against the defendants in Colorado State Court.
October 25, 1996 Plaintiffs file complaint in U.S. District Court for Judgment IN REM

December 16, 1996 - Plaintiffs withdraw motion of foreclosure in state court.

B. Limitations:
C. In order to clarify how limitations under 12 U.S.C. 1821 (d) (14) are to be applied, it is first necessary to trace the development of such limitations through FSLIC and RTC.
1. FSLIC. On August 19, 1988, the date FSLIC was appointed receiver for FSLA, FSLIC received the benefit of the federal six year statue of limitations under 28 U.S. C. 2415 (a) . FDIC v. Bledsoe 989 F. 2d 805, 807 (5th Cir. 1993). Pursuant to section 2415 (a), limitations began to run on FSLIC's claim against Waring's from the date of Waring's default. FDIC V. Belli 981 F. 2d 838, 840-42 (5th Cir. 1993). When the note was assigned to Sunbelt FSB,(under receivership of the FSLIC) , FSLIC's six year statue of limitations were also assigned to Sunbelt, FSB. See Bledsoe, 989 F. 2d 810.
2. RTC. On August 9, 1989, FSLIC was abolished by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") and replaced with the RTC. 12 U.S.C. 1441a (b) (3) and (6); Resolution Trust Corp. V. Krantz; 757 F. Supp. 915, 918 (n. D. I11. 1991).
FIRREA maintained section 2415 (a) "s six year period of limitations, but changed the date on which the period began to run to the longer of -(I) the six (6) year period beginning on the

date the claim accrues, or (II) the period applicable under state law..." 12 U.S.C. 1821 (d) (14) (a) (I). The six year period in subsection I is applicable.

Section 1821 (d) (14) (b) provides the limitations begin to run on a contract claim from the later of (1) the date on which the cause of action accrues. Although "corporation" is defined in section 1811 as the Federal Deposit Insurance Corporation (the "FDIC"), it is axiomatic that FDIC limitations are equally applicable to the RTC. 12 U.S. C. A. 1441a (b) (4) (A); Krantz, 757 F. Supp. At 921 (the RTC is a corporation under the FDIC umbrella, and is subject to the same powers and limitations in carrying out the duties as is the FDIC.)

The retroactive effect of section 1821(d) is to change the date on which limitations begin to run on FSLIC's claim from June 20, 1988 (date of Waring's default) to August, 19, 1988 . (date FSLIC was appointed receiver for FSLA). Bledsoe , 989 F. 2d at 808-809.

This later date, however, is still more than six years before this action commenced, therefore, the dispositive question is whether an additional six year period was stacked on FSLIC's period when the note was received for the first time.

The District Court's interpretation of public policy in lieu of case law or clear cut wording of legislative intent of the statute and Plaintiff's claims that the statute of limitations defense is not valid is based on a misunderstanding of the facts. Plaintiff states the FSLIC assigned Federated's assets to "Old Sunbelt" and the state four year statute was still running until Sunbelt is resolved on April 25, 1991. His theory gives the six year time period to run until 1997. This assertion is incorrect for two reasons. (1) Sunbelt Savings, a Texas savings and Loan was placed into receivership August 19,1988 simultaneously as Federated Savings Association. Both institutions were acquired by agreements of the receivers into the Sunbelt, FSB. (2) he ignores Federated Savings and Loan being placed under receivership on August 19, 1988 as the triggering of the six

year statue Federal statute of limitation period. The Texas four year statute was superseded by 2415 (d) in both institutions. Plaintiffs theory of relying on Texas four year statute of limitations to continue to run until April 25, 1991 is flawed based upon incorrect or selective set of facts.
FDIC V. Bledsoe, supra at 805, 811 n. 8 the fact scenario presented to the U.S. Fifth Circuit Court of appeals is analogous to the case at bar.

FSLIC transferred and assigned Bledsoe's note, which it held as receiver of a failed Savings and Loan, to another savings and loan-Federal Savings. Id. At 806. Federal Savings subsequently failed and FSLIC received the note again. Id. While holding the note for a second time, FIRREA was passed, FSLIC was abolished, and FSLIC's assets were transferred to the FDIC. Id. At 807.

The FDIC then brought suit against Bledsoe.
The issue decided by the Fifth Circuit in Bledsoe, although not applicable to this case, was whether FSLIC's six year limitations were transferred to Federal Savings when FSLIC assigned the note, or whether upon transfer to a private party applicable limitations reverted to those set by state law. Id. At 808.
At the district court level, the court entered summary judgment for Bledsoe stating the FSLIC;s transfer of the note made Texas's four year statue of limitation applicable, and thus the FDIC's claim became stale when such limitations expired while the note was being held by Federal Savings. Id at 807.
In reversing the district court's decision, the Fifth Circuit held that private assignees of FSLIC and the FDIC are entitled to the same six year period of limitations as FSLIC and FDIC. Id. At 811.
The relevant part of the Fifth Circuit's opinion, and the portion that prescribes the decision to be made by this court, appeared in footnote 8 of the court's opinion. "To prevent the possibility of an infinite period of limitations the FDIC cannot receive a

new six year period every time it re-receives a note. Having received the benefit of the federal six year statue on a given note, the FDIC cannot gain an additional six years by assigning the note to a private party and then receiving it again." Id. At 811, Fn. 8. Additionally, the court had ample opportunity to grant additional six years to the transfers back and forth to FDIC in its description of the travels of this note. Even though the note was reassigned and received by FDIC at subsequent dates after the initial receiving, the court ignored those transfers and ruled that after the passage of FIRREA, the date at which the limitations period began to run changed to the date at which the FSLIC first became receiver... Id. At 811. The notes would become stale six years from the date.

The District Court and Plaintiff's argument, that Bledsoe case is pure Dictum found in footnote 8 and a mere side comment having no bearing on the case, is ignoring the mathematics used by the court in determining the date the statute of limitations begin running and the date note is stale. The court very clearly considers the very questions of transfers between institutions and multiple acquisitions by FDIC and discards that concept of restarting the six year period beyond the first acquisition by FSLIC.

The 5th Circuit again considered Bledsoe in Cadle Co. v. 1007 Joint Venture 82 F3d 102(5th Cir. 1996) "FIRREA six-year period of limitations has no significance independent of a claim to which it applies; it attaches only to an accrued claim. The six year period is not triggered by the FDIC's appointment as receiver; rather, it becomes relevant only upon the accrual of a cause of action, at which time identifies the starting date of the six year period."(Id. 105). Under this judicial analysis a resetting of the six year statute of limitation would require a new cause of action to accrue. The case at bar considers one promissory note which matured on June 20, 1988. (date of the cause of action) and follows it through various assignments to FDIC and private assignees. The enactment of FIRREA and the relevant statute 1821(d)(14) on August 9,1989 changed the

starting date of the six year limitation period. Nothing else significant happened from June 20, 1988 to the present to create a new cause of action therefore the six year statute of limitation began on August 19,1988 and expired on August 19, 1994. If as the District Court reasons in its memorandum that an insured institution can repudiate a contract under 1821(e) and reset the statute of limitations and therefore extend the time of recovery of a failed note, then the logical extension of the argument is an infinite number of six year limitations to be reset unilaterally by FDIC. By example, if the promissory note of this case was sold by RTC in 1994 to a bank or savings and loan instead of to UMLIC(a private entity) and that bank or savings and loan after the purchase of the note went into receivership with FDIC as receiver, FDIC would arbitrarily under the District Court's reasoning then benefit from a new six year statute of limitations . This would theoretically allow FDIC or assigns until the year 2000 or beyond to file a claim against the maker of the note. The result would be 12 years or more after the cause of action and first receivership. This reasoning is inconsistent with case law about settled expectations or stale claims. Plaintiffs argue that RTC as conservator for Sunbelt Federal Savings, FSB is allowed to revive the six year statute of limitations. Any subsequent receivership or conservatorship of RTC would stand in the shoes of the assignor and gain equal but no greater rights than the assignee.(Jackson v. Thweat,883 S.W. 2d 171(Tex.)) In FDIC v. Bledsoe the court made it clear that the six year statute of limitations is not revived each time RTC succeeds as receiver or conservator. Congress wished to enable financial institutions to have the maximum time to collect on debt consistent with existing statute(2415). FIRREA'S 1821(d)(14) allowed holders of notes additional time by using the latter of cause of action or date of receivership but not to exceed the six years limitation. In fact this U.S. 5th Circuit ruling has been referenced in all subsequent cases involving Federal statute of limitation issues under FIRREA. Again in Cadle Co. v. 1007 Joint Venture the

court explains Bledsoe "we expanded the reach of federal law in Bledsoe in part on federal policy concerns" (Cadle Co.at 105). "We emphasized the need to facilitate Ò Congress" policy of protecting failed institutions" assets." Bledsoe, 989 F.2d at 811.and requotes Fall v. Keasler, 1991 WL 340182, at *4 (N.D. Cal. Dec. 18, 1991) " To hold that assignees are relegated to the state statutes of limitations would serve only to shrink the the private market for the assets of the failed banks. It would require the FDIC to hold onto and prosecute all notes for which the state statute of limitations has expired because such obligations would be worthless to anyone else. We believe that the court's clarification of Bledsoe in Cadle Co. has made footnote 8 very clear and that FIRREA expands FDIC or assignees rights to the six year statute rather than the shorter four year state statute and the accrual is triggered by the cause of action.

In 1990 Congress passed Judicial Improvement Act of 1990 28 U.S.C.1658 which "except, as otherwise provided by law, a civil action arising under a Act of Congress enacted after the date of enactment of this section may not be commenced later than four years after the cause of action accrues". Because FIRREA 1821(d)(14) has a specific time of six years, "as otherwise provided by law", this statute (1658) does not effect this FIRREA statute enacted in 1989. But it does show that Congress addressed the statute of limitation issue and clarified their intent and enacted an uniform time frame (four years) triggered by the cause of action.(See "On the Meaning of Silence: Using Federal Common Law to Fill The Gap in Congress residual statute of limitations "A. J. Mikva, James E. Pfander Yale L. J Nov. 1997 pg. 393-426).....This same explanation and analysis applies to this case before the Appeals Court. There is not implied or stated by the 5th Cir. court opinion that the statute of limitation can be reset or stacked but rather it is tied to the cause of action to trigger the accrual. As addressed in Cadle 105 "Indeed the text of FIRREA favors this view; it refers to "the applicable statute of limitations with

regard to any action brought by the [FDIC]."A study of recent case law addressing statute of limitation does not overturn or even challenge the decision in Bledsoe. (see Legal Econometrics,Inc. v. Chama Land and Cattle Company Co., Inc.,169 B.R. 876,885 (Bankr. N.D. Tex. 1994) Jackson v. Thweat 883 S.W.2d 171(Tex.), Davidson v. FDIC 44 F.3d 246(5th Cir. 1995) FDIC v.Enventure V. 77 F.3d 123 (5th Cir. 1996).

The District Court and Plaintiffs reference to 1821 (e) as being analogous is without merit. 1821 (e) (1) makes reference to contracts or leases. An argument that RTC may make changes because of the operating style of a corporation is not applicable to a statute of limitation question where operating style has no bearing on the requirement to resolve the running of the statute. Section 1821(e) references contract and leases between RTC and other entities and RTC right within a reasonable time to repudiate a lease on a building or mortgage servicing rights which existed when it took over as receiver and that it determined to be burdensome. In (Bayshore Executive Plaza Partnership vs. FDIC 943 F.2d), a case involving a lease on a building and where 1821(e) is applied, the court quoting American National Bank v. FDIC 710 F.2d 1528 "when federal statute addresses the issue of law in contention, the federal statute governs the dispute..." 1821(e) section of the statute is not applicable to this case. (see also RTC v Diamond et al 18 F. 3d 111(2d Cir., 1994) O'Melveny & Meyers v FDIC 114 S Ct. 2048 (1994). FDIC cannot independently or unilaterally use this section of the FIRREA statute to reset the statute of limitations. In order for the six year statute of limitation to be restarted there has to be a new cause of action. The facts are not in dispute on the issue of the cause of action (June 20, 1988) or the date of the first receivership (August 19, 1988). No facts presented in this case show at any time after these dates that a new cause of action occurred or that FDIC used any statute to reset the six year limitation period. The other fact issues only show the travels of this particular note

through various assignment of ownership. There was no new cause of action. Therefore there cannot be a resetting of the statute of limitations. Why would the plaintiff go to 1821(e) of FIRREA and borrow language from this section to make his argument on a statute of limitation case. In Short v. Belleville Shoe Manufacturing Co. 908 F.2d 1385,1393 (7th Cir. 1990) (Posner J., concurring) which explains the regime of borrowing "runs the risk of applying one unprincipled legislative deal to a problem entirely outside the scope of the deal". Also in Wilson v. Garcia, 471 U.S. 261, 282 (1985) (O'Conner, J., dissenting) (stating that limitation periods are not purely arbitrary); Johnson v. Railway Express Agency, 421 U.S. 454, 463-64
(1975) (swing that the period selected should reflect a balance between " the interests in favor of protecting valid claims" and the " interest in prohibiting the prosecution of stale ones") In reflecting how specific the statute is interpreted the court in FDIC v. Enventure V at 125 analyzed the statute 12 U.S.C. 1821(d) (14) as to the relevance of wording " beginning on the date" and ruled that FDIC was one day late in taking action. The court went on to say "Generally, the court must "assume that "the legislative purpose is expressed by the ordinary meaning of the words used." United States v Locke 471 U.S. 84,94,105 S. Ct.1785, 1793, 85 L.Ed. 2d 64 (1985) quoting Richards v. United States, 369 U.S. 1,9,82 S. Ct. 585,591, L.Ed. 2d 492 (1962) The wording or any discussion of 1821(e) and any possible right of FDIC to repudiate does not enter into the decisions of the court.

We believe that the U.S. District Court's ruling was in err. There is case law that supports our argument of no stacking of the statute of limitations in the 5th Circuit decision in FDIC v. Bledsoe, 1821(d) (14) is a specific statute that applies to the six year statute of limitation. Nothing significant occurred from when Federated Savings was placed into receivership August 19, 1988 and until UMLIC-Nine filed suit in October 25, 1996 in U.S.District Court. The six year Federal Statute of Limitations under 1821(d)(14) had expired as of August 19, 1994 and the plaintiffs are time barred

from taking any action.The District Court's use of 1821(e) to justify the resetting the statute of limitations is not consistent with other case law in determining statute of limitation issues.

The 10th Circuit Court of Appeals affirmed the order and opinion of the U.S. District Court. They concluded as the District Court that congressional intent is best served by resetting the statute of limitations on the note when RTC became receiver for Old Sunbelt, even though the RTC previously held the note for Federated.

The 10th Circuit Court of Appeals panel's decision of February 16th, 1999 conflicts with a decision of the United States Supreme Court (O'Melveny & Meyers v FDIC 114 S Ct. 2048 (1994) and United States, Petitioner v. Chris W. Beggerly et al, (1998) 141 L ED 2d 32 No. 97-731. In addition the panel ruling conflicts with the authoritative decisions of the Fifth Circuit Court of appeals. . FDIC v. Bledsoe 989 F. 2d 805, 807 (5th Cir. 1993).) FDIC v. Enventure V. 77 F.3d 123 (5th Cir. 1996)., FDIC v. Shrader & York 991 F2d 219(5th Cir. 1993), RTC v. John V. Seals et al. 13 F.3d 850 (5th Cir. 1994) FDIC v. Dawson 4F. 3d 1303(5th Cir. 1993) FDIC v. Belli, 981 F. 2d 838,842 (5th Cir. 1993), Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938), FDIC v. Former officers v. Hinkman, 848 F. 2d 432, 434 (3rd Cir. 1988), (United States of America, v. A. Guy Crouch and Michael J. Frye Fifth Circuit 93-7719, April 20, 1995.), United States v. Marion (404 U.S. 307 (1971), United States v. Lovasco, 431 U. S. 783 (1977), United States v. Brand (556 F. 2d. 1312 (Fifth Cir. 1977) cert. Denied, 434 U.S. 1063 (1978))., United States v. Townley (665 F 2d. 579 (5th Cir.), cert. Denied, 456 U.S. 1010 .The appellate panel in its ruling misconstrued the facts in its description of the travels of this loan. The Court states the FSLIC assigned Federated's assets to "Old Sunbelt" and Old Sunbelt failed on April 25, 1991. This assertion is incorrect, Sunbelt Savings, a Texas savings and Loan was placed into receivership August 19,1988

simultaneously as was Federated Savings Association. Both institutions, Federated Savings Association and Sunbelt Savings, were acquired by agreements of the receivers into the Sunbelt, FSB "Old SunBelt" which continued to operate as the receiver of all those two institutions plus others. On April 25, 1991 the FDIC made an administrative pass through of these assets to a new entity it created unilaterally. The asset continued under control and management of the FDIC as conservator or receiver through out its life until sold to the predecessor of UMLIC in 1995. Any changes of receivers or control was purely administrative. The management or ownership of Sunbelt never changes from FDIC to private ownership and then back to FDIC, as was the case in Bledsoe. The court with its ruling is allowing the FDIC a new management tool to be able to manipulate the state statute of Limitations unilaterally by simply making an administrative declaration of change with no regard to cause of action. The FDIC had full control of this asset for the more than generous statute of limitations period provided by 2415 (a) and FIRREA 1821 (d) (14) and did not perfect it rights. It now gets another bite at the apple. The court has granted a form of equitable tolling for the successors to the FDIC. The FIRREA statute and its time frames are very clear and as Chief Justice Rehnquist has stated in an analogous quiet title action for the government. (United States, Petitioner v. Chris W. Beggerly et al, (1998) 141 L ED 2d 32 No. 97-731).

"Given this fact, and the unusually generous nature of the QTA" limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted. This is particularly true given that the QTA deals with the ownership of land. It is of special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge. Equitable tolling of the already generous statute of limitations incorporated into the QTA would throw a cloud of uncertainty over these rights and we hold that is incompatible with the statute 2. The court has based its ruling on the congressional intent as expressed in

Senator Riegle's reference to "maximizing recoveries to the greatest extent permissible by law." Most of the references to this comment center on and cite Supreme Court Cases that enable a legislature to constitutionally revive stale claims. 135 Cong. Rec. 10205 (daily ed. Aug 4, 1989) Electrical Workers V. Robbins & Meyers Inc., 429 I.S. 2259, 243 (1976), and Chase Sec. Corp, v. Donaldson, 325 U.S. 304, 311-16 (1945). It makes no reference to extending time frames after the FDIC has the claim under its control, only to those claims that had expired. Perhaps the question should be why the FDIC did nothing for a period of over six years when they specifically were granted this additional time. FDIC had knowledge and control of all the files and the responsibility to act.

In RTC as receiver of Jasper Federal Savings & Loan Association v. John H. Seale, Et al. 92-5273, Fifth Cir., the Fifth Circuit interprets the Riegle argument "in interpreting statutes of limitations, we can presume that the limitation period promotes the value of repose by protecting citizens from state or vexatious government claims, FDIC v. Belli, 981 F. 2d 838,842 (5th Cir. 1993) See also Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938), or we can view statutes of limitations in a way that protects governmental claims by keeping the courthouse doors open. Belli, 981 F. 2d at 842; see also FDIC v. Former officers v. Hinkman, 848 F. 2d 432, 434 (3rd Cir. 1988) We have styled these arguments as "interpretive rules or policy inquiries" that need not be reached when a limitations period is unambiguous". The plain language of the FIRREA limitation is six years from the date of the first appointment. FIRREA established these new limitations for bringing those claims, which also seemingly allows claims that had lapsed, logically permitting the RTC to resurrect claims stale from the early twentieth century. The Courts in Belli and Dawson have rejected that concept of reviving stale claims. It follows that the converse of the limits on the RTC's power should be equally compelling. Even though Congress was concerned about reviving the stale claims, the courts have not

been willing to grant them a Carte blanche time frame. The Court cannot keep granting a time period that is a sliding time period of six years beyond the end of state statute of limitations, as this formula would give a total of ten years from the cause of action. If the Congress had intended that period they would have done so. Congress in its drafts was clearly concerned about claims that had expired under the state statutes and not if FDIC failed to act six years hence. Expired claims are the genesis of Senator Riegle's remarks. One of the drafts S.Rep. No. 101-19, 101st Cong., 1st Sess. (1989) rejected a proposed draft that disallows revival of claims which gives rise to a possibility of intent to revive claims. The courts In Belli and Dawson placed a limitation and ruled claims that have expired cannot be revived.. Conversely, there should be an equal limitation on the power of government to go beyond the initial six year period under the doctrine of clear statement that Belli uses. If Congress intended to go beyond the six-year period that must do so clearly. "Because 1821 (d) (14) also lacks a clearly expressed intent to the contrary, we hold that in does not revive claims that expired before its effective date", FDIC v. Belli, 981 F. 2d 838,842 (5th Cir. 1993). The converse application applies to this reading of FIRREA 1821 (d) (14). The statute does not clearly state the six years is restarted each time the corporate entity FDIC changes from receiver to conservator and back to receiver. The unambiguous date of first appointment as FDIC receiver August 19, 1988 must apply as the beginning point.

3. Notwithstanding the courts non-persuasive view of Bledsoe, the fifth circuit views this as more than dicta in its Bledsoe line of cases, Legal Econometrics, Inc. v. Chama Land and Cattle Company Co., Inc., 169 B.R. 876,885 (Bankr. N.D. Tex. 1994), et al.

In FDIC v. Enventure V, et al, Fifth Circuit 94-20934 "In Bledsoe, the court was required to determine the appropriate statute of limitation held by assignees of the FDIC and the Federal Savings and Loan Insurance Corporation ("FSLIC"). In Cadle Company v. 1007 Joint Venture et al, 95-50403 the court

"Expanded the reach of Federal Law in part on Federal policy concerns that are here less salient. In Bledsoe we emphasized the need to facilitate "Congress policy of protecting failed institution s' assets. 989 F. 2d. at 811."Also in Cadle at 105, the court in restating their position in Bledsoe said that the receivership is not independent of the cause of action. " The six year period is not triggered by the FDIC's appointment as receiver; rather, it becomes relevant only upon the accrual of a cause of action." This note was constructed under Texas law. In Davidson v. FDIC 44F 3d. 246(5th Cir. 1995), the Court concluded" absent special circumstances, it is not consistent with the manifest scheme of the Texas Law that the mortgage follows the debt" and " which seeks to harmonize the limitation period applicable to both the note and security." " Texas law strives to protect from secret tollings or extensions the unknowing bona fide purchaser who acquired the land when the limitations on the debt has facially expired."
Again in Davidson v. FDIC 44F 3d. 246(5th Cir. 1995) the court quoting O'Melveny, (O'Melveny & Meyers v FDIC 114 S Ct. 2048 (1994), in the absence of an applicable and contrary federal rule, the Court refused to displace state law merely because of the FDIC receiver's connection to the suit. "The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred." The Court rejected the suggestion of the FDIC that there was a Federal interest in simply not depleting the deposit insurance fund. Because "neither FIRREA nor the prior law sets forth any anticipated level for the fund, " the Court concluded that the FDIC was effectively asserting a "federal policy that the fund should always win." The Court rejected this so-called "more money" argument. The government cannot continue to create a new point of beginning for the time frames, In effect a sliding time period through out the State (Texas) statute and then choose which period most

conveniently fits its purpose. The trigger of appointment of a receiver or conservator is exactly that. The State time period ends and the Federal statute begins. The selection period described by the court is now so arbitrary and far afield of the original cause of action that it is not a date certain that can be relied upon. The government gets to choose from any or all of; (1) date Federated was closed, (2) date Federated was merged into Sunbelt FSB, receiver,(3) Date of FIRREA enacted, (4) Date Sunbelt FSB, receiver converted to Sunbelt Federal Savings Bank, Conservator (April 1991), (5) Date Sunbelt Converted back from Conservator to receiver, (April 1992). The government has the ability to manipulate these dates and a citizen has no recourse.

The Lower Courts has placed the petitioners in the proverbial box. It has ruled there is not sufficient evidence of a release provision presented to prove its case and yet no meaningful discovery was available to defendant. "Time has passed and the files have been lost". Plaintiff has stated in response to discovery requests that the files have been misplaced over a period of time and no complete record exists. Now with this ruling the court has reconstructed the normal protection of the statute of limitations to be extended to a time period that accommodates the government. Defendants right of discovery and its ability to rely on the statute of limitations as written have been denied.

The defendants are asserting presumptive and actual prejudice caused by the passage of time, (United States of America v. A. Guy Crouch and Michael J. Frye Fifth Circuit 93-7719, April 20, 1995). In a criminal case, (United States v. Marion (404 U.S. 307 (1971), the Supreme Court held that, although the primary protection against undue delay prior to arrest, indictment, or information is the appropriate statute of limitations, the due process clause of the fifth amendment offers some protection from prejudice to a defendant's case arising from this delay. "The Lovasco Court (United States v. Lovasco, 431 U. S. 783 (1977). Stated "...the due process

Stated "...the due process inquiry must consider reasons for the delay.....whether the delayed prosecution violates "elementary standards of fair play and decency ....". The Fifth Circuit noted In Brand, (United States v. Brand (556 F. 2d. 1312 (Fifth Cir. 1977) cert. Denied, 434 U.S. 1063 (1978)). "....that Lovasco stood for balancing the governments need for the delay against actual prejudice suffered by the defendant.... "The Townley case, (United States v. Townley (665 F 2d. 579 (5th Cir.), cert. Denied, 456 U.S. 1010 (1982)), left no doubt that a showing of bad faith by the government was not a requisite for a due process violation."

The record submitted to the court has reference to lost exculpatory evidence, including a release agreement, which we have not been able to discover due to lack of any complete files held by the plaintiff. The failure to produce these through discovery or even conduct discovery is evidence of actual prejudice. The case should be dismissed for prejudice.

The U.S. District Court and the Appellate Court have granted an extension to the government that was not nor could have been considered by Congress. It is inconceivable that Congress would have considered a situation where they gave their agency the additional time to act because of FDIC's own failure to carry out its duty for whatever reason. The Lower courts has ruled in contravention to the sense of the Fifth circuit where a significant portion of these RTC/FDIC failures has occurred and where the Sunbelt Savings/Federated Savings asset dispositions generally are reviewed. The statute of limitations on its face have clearly passed and the action of the Plaintiff should be time barred. Additionally, the defendant has suffered actual and presumptive prejudice to its case by the extraordinary passage of time and the action should be dismissed for prejudice.

Conclusions

Wherefore, Petitioners, Richard S. Waring ,Joseph T. Waring, Melinda P. Waring pray that the court grant our writ of certiorari and reverse the order of summary judgment by the U.S. District Court and 10th Circuit Court of Appeals and such other and further relief both general and special, at law and in equity to which Richard S. Waring, Joseph T. Waring, and Melinda P. Waring may show themselves to be justly entitled.

Respectfully submitted this 13th Day of July, 1999

Richard S. Waring Joseph T. Waring Melinda P. Waring

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.96-8-2495

UMLIC-NINE CORPORATION, a North Carolina corporation.
Plaintiff

F I LED
United States District Court

DENVER, COLORADO

James R. Manspeaker Clerk

May 13, 1998

V.

LIPAN SPRINGS DEVELOPMENT CORPOPATION, a Texas corporation; RICHARD S. WARING; JOSEPH T. WARING; MELINDA P. WARING; THE WARING CH[LDREN'S IRREVOCABLE TRUST; KAREN SHEAFFER, AS PUBLIC TRUSTEE OF EAGLE COUNTY,COLORADO AND ALL OCCUPANTS OR OTHER UNKNOWN PERSONS WHO CLAW ANYINTEREST IN THE SUBJECT MATTER OF THIS ACTION,

Defendants.

JUDGMENT

PURSUANT TO and in accordance with the Memorandum Opinion and Order entered May 12, 1998, by the Honorable Lewis T. Babcock, United States District Judge, it is ORDERED THAT judgment IN REM is entered in favor of the plaintiff, UMLIC-NINE Corporation, and against the defendants, Lipan Springs Development Corporation, a Texas Corporation; Richard S. Waring; Joseph T. Waring; Melinda P. Waring; the Waring Children's Irrevocable Trust; Karen Sheaffer, as Public Trustee of Eagle County, Colorado and All Occupants or Other Unknown Persons Who Claim Any Interest in the Subject Matter of this Action, in the principal amount of S250,000.00 and interest accruing at the rate of 11.0% from June 21, 1986, through June 20, 1988 and thereafter at the rate of 18% to the date of judgment, plus 5% of any and all installments due and owing and not paid within fifteen (15) days after the date the same was due, on the real property in Eagle County, Colorado described as:

BEING Unit 17, BOOTH FALLS MOUNTAIN HOMES, according to the map thereof of record and according to the Condominium Declaration for BOOTH FALLS MOUNTAIN HOMES, recorded February 26, 1974, in Book 233 at Page 550 and as amended by instrument recorded April 8, 1974, in Book 234 at Page 124, subject to the provisions, conditions and obligations as contained in said Condominium Declaration and Amendment; and encumbered by the Deed of Trust recorded in Book 446, page 393 in the real property records of the Clerk and Recorder of Eagle County, Colorado. It is

FURTHER ORDERED that plaintiff's Deed of Trust is determined to be a prior and superior lien to the interest of any of the defendants on the property. It is

FURTHER ORDERED that the U.S. Marshal is DIRECTED TO SELL the above described property at public

sale and APPLY the proceeds thereof to plaintiffs judgment. It is FURTHER ORDERED that interest shall accrue on the total judgment at the 5.407% from date of entry of judgment until paid.

FURTHER ORDERED the upon the filing of a bill of costs and attorney's fees documentation within 10 days from the date of entry of the Order and Judgment, plaintiff is granted its costs and attorney's fees.

DATED at Denver, Colorado this 13th of May, 1998.

FOR THE COURT:
JamesManspeaker, Clerk

By: " s/ Stephen P.Ehrlich"

Stephen P. Ehrlich,
Chief Deputy Clerk

APPROVED:

"S/Lewis T. Babcock"
LEWIS T. BABCOCK
United States District Judge

Entered ON THE DOCKET MAY 1 3 1998

JAMES R MANSPEAKER CLERK

6. upon filing of a bill of costs and attorney's fees documentation within 10 days from the date of this Order, plaintiff is granted its costs and attorney's fees.

Dated: May 12, 1998 in Denver, Colorado.

BY THE COURT:

"s/LEWIS T. BABCOCK", JUDGE

ENTERED
ON THE DOCKET

MAY 13,1998
JAMES R MANSPEAKER, Clerk
IN THE UNITED ATESTS DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 96-B-2495

The undersigned certifies that a copy of the foregoing Judgement was served on May 13, 1998, by:

(X) delivery to:

U.S. Marshal

Magistrate Judge Bruce D. Pringle

(X) depositing the same in the United States Mail, postage prepaid, addressed to:

Elizabeth A. Maldonado, Esq.
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Mary Joan Beranato
Deputy Eagle County Attorney
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Eagle, CO 81631

"s/ N. Hatcher"
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 96-B-2495

UMLIC-NINE CORPORATION, a North Carolina corporation,

Plaintiff,

V.

FILED
UNITED STATES DISTRICT Court DENVER. COLO

MAY 13,1998

JAMES R. Manspeaker
"s/ CLERK

LIPAN SPRINGS DEVELOPMENT CORPORATION, a Texas corporation; RICHARD S. WARING; JOSEPH T. WARING; MELINDA P. WARING; THE WARING CHILDREN'S IRREVOCABLE TRUST; KAREN SHEAFFER, AS PUBLIC TRUSTEE OF EAGLE COUNTY, COLORADO AND ALL OCCUPANTS OR OTHER UNKNOWN PERSONS WHO CLAIM ANY INTEREST IN THE SUBJECT MATTEROF THIS ACTION,

Defendants.

MEMORANDUM OPINION AND ORDER

Babcock, J.

In this diversity action, plaintiff UMLIC-Nine Corporation (UMLIC) moves for summary judgment seeking judgment in rem against property located in Eagle County Colorado in the principal amount of $250,000.00 plus interest,

attorney's fees and costs, an order directing the U.S. Marshal to sell the property at public sale, and application of the proceeds to their judgment.

Also pending is the cross-motion for summary judgment filed by defendant The Waring Children's Irrevocable Trust, in which pro se defendants, Joseph T. Waring (J. Waring), Melinda Waring (M.Waring), and Richard S. Waring (R. Waring) join. Oral argument would not materially assist in the determination of the motions. After consideration of the motions and briefs, I will grant UMLIC's motion and deny defendants' cross-motion.

I.

The following facts are undisputed. On June 20, 1986, defendant Lipan Springs executed and delivered a promissory note(Note) payable to Federated Savings and Loan Association (FSL) in the original principal amount of $250,000.00. The same day, J.Waring, M.Waring, and R.Waring executed a deed of trust for the benefit of FSL as partial security for the Note. The deed of trust encumbers a Booth Falls Mountain Homes condominium unit in Vail, Colorado. The deed of trust was recorded in Book 446, Page 393, in the real property records of the Clerk and Recorder of Eagle County, Colorado.

Initially, the Note was due and payable on June 20,1987. The term of the Note and deed of trust was extended and modified by written agreement executed effective June 20,1987, to be due on June 20, 1988. Defendant Lipan Springs defaulted on the Note and deed of trust, as modified and extended, when it failed to pay the amount of principal and interest due June 20, 1988. No payments have been made on the Note by the maker or any guarantor of the Note, or by any other person. On August 19, 1988, FSL was declared insolvent and the FDIC, acting through the Federal Savings and Loan Deposit Insurance

Corporation (FSLIC), was appointed receiver. The FSLIC then transferred FSL's assets to Sunbelt Savings, FSB (Old Sunbelt). Thereafter, Old Sunbelt failed and the FDIC, acting through the Resolution Trust Corporation (RTC), was appointed receiver on April 25, 1991. On the same day, the assets and liabilities of Old Sunbelt were transferred to Sunbelt Savings, FSB (New Sunbelt) and the RTC was appointed the conservator of New Sunbelt. On April 9, 1992, the RTC became the receiver for New Sunbelt. In 1995, the Note was acquired from the RTC by UMLIC's predecessor in title. On February 22, 1996, the Note and deed of trust was assigned to UMLIC. Pltf. Ex. Kechijian Aff. ¶ 9. UMLIC filed a motion for foreclosure in Eagle County District Court on March 22, 1996 which, upon UMLICÕs motion, was dismissed without prejudice on December 16, 1996. This action was filed on October 25, 1996.

II.

Summary Judgment Standard

The very purpose of a summary judgment motion is to assess whether trial is necessary. White V. York Int'l Corp., 45 F.3d 357, 360 (10th Cir. 1995). Fed.R.Civ.P. 56 provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The non-moving party has the burden of showing that there are issues of material fact to be determined. Celotex Corp. n Catrett, 477 U.S. 317, 322 (1986). A party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, interrogatories, and admissions on file together with affidavits, if any, which it believes demonstrate the absence of genuine

issues for trial. Celotex 477 U.S~ at 323; Mares V. ConAgra Poultry Co., Inc., 971 F.2d 492,494 (10th Cir. 1992). Once a properly supported summary judgment motion is made, the opposing party may not rest on the allegations contained in his complaint, but must respond with specific facts showing the existence of a genuine factual issue to be tried. Otteson V. US., 622 F.2d 516, 519 (10th Cir. 1980); Fed.R.Civ.P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the pleadings themselves." Celotex, 477 U.S. at 324.

If a reasonable juror could not return a verdict for the non-moving party, summary judgment is proper and there is no need for a trial. Celotex, 477 U.S. at 323. The operative inquiry is whether, based on all documents submitted, reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. Anderson V. Liberty Lobby Inc., 477 USL 242,250 (1986). However, summary judgment should not enter if; viewing the evidence in a light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor, a reasonable jury could return a verdict for that party. Anderson Liberty Lobby, Inc., 477 U.S. at 252; Mares, 971 F.2d at 494. Unsupported allegations without "any significant probative evidence tending to support the complaint" are insufficient, see White at 360 (internal quote and citation omitted), as are conclusory assertions that factual disputes exist. Anderson, 477 U.S. at 247-48. Where, as here, the parties file cross motions for summary judgment, I assume that no evidence need be considered other than that filed by the parties. Nevertheless, summary judgment is inappropriate if disputes remain as to material facts. James Barlow Family Ltd. Partnership;'. David M. Munson, Inc., 124 F.3d 1321, 1323 (10th Cir. 1997).

III.

A. Statute of limitations

The first question is whether this action was filed in this court within the applicable federal statute of limitations contained in the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821.

UMLIC argues that when Old Sunbelt failed on April 25, 1991 and the RTC was appointed its receiver the same day, the 6 year statute of limitatios began running anew as of that date. Under this theory, an action on the Note is vialbe as long as it was filed by April 24, 1997. Defendants argue that FIRREA does not allow a new statute of limitations period each time a receiver or conservator it appointed.

In determining the scope of the FIRREA, the starting point is the language of the statute itself. Kasier Aluminum & Chemical Corp. V. Bonjorno, 494 U.S. 827, 835 (1990)(internal quotations and citation omitted). "The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." United Stares V. Ron Pair Enter., Inc., 589 U.S~ 235, 242 (1989)(internal quotations, brackets and citation omitted). I must also look to the provisions of the whole law, and to its object and policy. Aulston v. United States, 915 F.2d 584,589(10th Cir. 1990), cert denied,Ñ-U.S.Ñ, Ill S.Ct 2011, 114 L.Ed.2d 98 (1991).

The State of Colorado statute of limitations for contract actions is 6 years. Section 13-80-103.5(l)(a), C.R.S. In the State of Texas, the state in which the promissory note was executed, the statute of limitations for contract actions is 4 years. Tex.Civ.Prac. & Rem.Code 1 6.004(a)(3)(Vernon's 1986). Although not addressed directly, each party relies on the State of Texas' statute of limitations. Default occurred on June 20, 1998,

the maturity date on the Note. Therefore, neither states' statute of limitations had expired when the RTC acquired the Note on August 19, 1988. Pursuant to § 1821(d)(14)(B), the federal six year statute of limitations began to run on August 19, 1988. Therefore, if there were no further intervening occurrences, any action on the Note had to be filed before August 19, 1994. It is well settled that a private assignee of the FDIC/RTC is entitled to the benefit of the FIRREA statute of limitations if the loan was in default and not barred by the state statute of limitations when the FDIC/RTC acquired the asset. Cadle Company v. 1007 Joint Venture, 82 F.3d 102, 105 (5th Cir. 1996); Tivoli Ventures, Inc. V. Bumann, 870 P.2d 1244 (Cob. 1994); Jackson V. Thweatt, 883 S.W.2d 171 (Tex.)., cert denied sub nom Weatherly v. Federal Debt Mgrnt., Inc., 513 U.S. 872(1994).

The FIRREA is silent on the effect of subsequent appointments of receivers and conservators on the statute of limitations. Therefore, an analysis of the plain meaning of the statutory language is futile. Also, research fails to reveal a court decision addressing whether § 1821 (d)(14) allows stacking of the FIRREA statute of limitations as sought by UMLIC. Equally unavailing is the argument that if Congress intended to reset the statute of limitations each time a receiver or conservator was appointed it could have inserted into FIRREA the words "each time" or "every time." The opposite argument is equally plausible, however. If Congress intended the statute of limitations period to begin on the FDIC's initial appointment as receiver or conservator only, it could have inserted the word "initial."

Consequently, I turn to an examination of the statute as a whole and policy considerations to determine this issue.

In 1989, Congress enacted FIRREA in response to the "precarious financial condition of the nation's banks and savings

and loan institutions." Resolution Trust Corp.V. Love, 36 F.3d 972 (10th Cir. 1994) quoting Henderson V. Bank Qf NeW England, 986 F.2d 319, 320 (9th Cir. 1993). FIRREA gives broad powers to the RTC "to deal expeditiously with failed financial institutions." Id.

The FIRREA statute of limitations provides:

A. In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be -

i. in the case of any contract claim, the longer of –

I. the 6-year period beginning on the date the claim accrues; or

II. the period applicable under State law;

B. Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of-

i. the date of the appointment of the Corporation as conservator or receiver; or

ii. the date on which the cause of action accrues.

12 USC § 1821(d)(l4).
However, the FIRREA limitation period only applies to a claim not barred by a state statute of limitations on the date the FDIC

is appointed receiver or conservator for the financial institution holding the promissory note. FDIC v. Regier Carr & Monroe, 996 F.2d 222, 225 (10th Cir. 1993).

Defendants contrast § 1821(d)(14)'s statute of limitations language concerning actions "brought bv the Corporation as conservator or receiver" with the language in 1 821(e) that the Òconservator or receiver for any insured depository institution may disaffirm or repudiate any contract. . . ." Defendants argue that the use of the term "Corporation" in § 1821(d)(14) and the omission of "Corporation" from § 1821(e) mandates that the two sections be interpreted differently. They argue that Congress" use of the word "corporation" in § 1821(d)(14) refers only to the FDIC, not to the RTC, which they assert is merely an umbrella organization exclusively managed by the FDIC. Based on this premise, defendants argue that the FDIC has a different status than the RTC when acting as a conservator or receiver. Under defendants' analysis, the emphasis of § 1821 (d)(14) is on the FDIC operating through either the FSLIC or the RTC while § 1821(e)'s silence as to the "Corporation," makes its provisions available to any "conservator or receiver" appointed for any insured depository institution. Def Brief, p.7.

Defendants' argument ignores the gist of 12 USC § 1441a, enacted on the same day as FIRREA. Section 1441a provides, in pertinent part, for the "[establishment of] a Corporation known as the Resolution Trust Corporation which shall be an instrumentality of the United States." Id. at § 1441a(b)(1)(A). Moreover, the RTC's operations are monitored and overseen by the Thrift Depositor Oversight Board, § 1441a(a)(22), not the FDIC, and is managed by its chief executive officer. § 1441a(b)(1)(C). Section 1441 a(b)(1)(B) provides:

[t]he Corporation [RTC], when it is acting as a conservator or receiver of an insured depository institution, shall be deemed to be an agency of the United States to the same extent as the Federal Deposit Insurance Corporation when it is acting as a conservator or receiver of an insured depositorv institution.

12 USC § 1441a(1,)(1)(B)(emphasis added). Further, Section 1441a(b)(4)(A) states:

In addition to any other provisions of this section, the Corporation [RTC]1 shall have the same powers and right to carry on its duties with respect to institutions described in paragraph 3(A). as the Federal Deposit Insurance Corporation has under sections 1821 1822. and 1823.

12 USC § 1441a(b)(4)(A)(emphasis added). For analytical purposes, therefore, there is no distinction between the RTC and the FDIC. Thus, the use of the word "corporation" in the statutes encompasses the FDIC and the RTC.

The RTC in its corporate capacity is a discrete legal entity from RTC in either of its capacities as receiver or conservator. Dababneh v. FDJC, 971 F.2d 428, 431(10th Cir. 1992); FDIC v. Bernstein, 944 F.2d 101(2nd Cir. 1991). Hence, courts interpreting § 1821(e) allow successive conservators or receivers a new right of repudiation of contracts. See e.g.,]]85 Avenue ofthe Americas Associates v. RTC, 22 F.3d 494, 496-97 (2nd Cir. 1 994)(under § 1821(e) the RTC, as newly appointed receiver, had a new reasonable period to repudiate a contract even though it had earlier been the conservator without repudiating the contract). RTC v. CedarMinn Building Ltd Partnership, 956 F.2d 1446 (8th Cir.), cert denied sub nom. CedarMinn Building Ltd. Partnership v. RTC, 506 U.S. 830 (1992) addressed the timeliness of the RTC's repudiation of

leases under § 1821(e). In discussing the independent repudiation rights of the RTC as conservator and as receiver the Court stated:

In [§§ 1821(e)(1) and (2)], Congress repeats the dual treatment of "conservator or receiver" seven times. Nowhere in the language of the statute is it stated or implied that the appointment of the RTC as a conservator negates powers RTC would enjoy if it were later appointed a receiver of the same institution. Had Congress intended RTC's status as a conservator or receiver to be mere artifice, it would have granted all duties, rights, and powers to the Corporation.

CedarMinn, 956 F~2d at 1450. The Court further explained:

> Throughout FIRREA, Congress specifically articulated when the Corporation was to exercise a duty, right, or power in its capacity as a "conservator or receiver." In each instance it is clear that Congress intended the duty, right, or power to be enjoyed or exercised by both the conservator and the receiver. It stretches credibility to assume Confress intended anv of these rights to be forfeited in instances when the Corporation preceded itself as conservator or receiver of an institution. More instructive, however, is the care Congress took to delineate those duties, rights, and powers the Corporation could pursue only in its capacity as receiver, or only in its capacity as conservator, but not both.

Id. at 1451-52 (emphasis added). In a footnote, the Court listed all of the duties, rights, and powers that FIRREA grants to both the receiver and the conservator, including the enlargement of the statute of limitations found in § 1821(d)(14).

Also significant is the fact that Congress granted the RTC all of the receivership and conservatorship powers it

granted the FDIC pursuant to 12 USC § 1441a(b)(4). Therefore, the use of the term "Corporation" refers both to the FDIC and the RTC exercising these parallel powers. Thus, the § 1821(e) cases allowing successive statutes of limitations upon appointment of subsequent receivers or conservators are applicable, by analogy, to this case.

Defendants rely on FDIC n B'edsoe, 989 F.2d 805 (5th Cir. 1993) and Legal Econometrics, Inc. V. Chama Land & Cattle Co., Inc., 169 B.R. 876, 885 (Bankr. N.D.Tex. 1994) in support of their position that the FIRREA statute of limitations begins to run as of the appointment of the first receiver or conservator and does not start over every time a new receiver or conservator is appointed.

In Bledsoe, the sole issue before the Court was whether the six-year statute of limitations was transferable to a private assignee of the EDIC. The Court stated in a footnote that:

"[t]o prevent the possibility of an infinite period of limitations the FDIC cannot receive a new six year period every time it re-receives a note. Having received the benefit of the federal six year statute on a given note, the FDIC cannot gain an additional six years by assigning the note to a private party and then receiving it again.

Bledsoe, 989 F.2d at 812. However, this statement was dictum as this issue was not before the Court and not necessary to its holding that the benefit of the federal statute of limitations was transferable to the FDIC's private assignee. Moreover, the case was decided under 28 USC § 2415, the general federal statute of limitations provision in effect before FIRREA's was enacted.

Legal Econometrics, a bankruptcy court decision, merely recites the Bledsoe dictum without analysis. Also, in Legal Econometrics, the FDIC acquired the loan at issue by

purchase, not by appointment as receiver or conservator. Thus, unlike the RTC in this case, the FDIC was an assignee which stood in the shoes of its assignor.

The separate capacities of receiver and conservator buttresses UMLIC's assertion that successive appointments starts anew the statute of limitations period. In their capacity as conservator, the FDIC or the RTC must marshal a failed institution's assets and attempt to restore it to an ongoing concern. See CedarMinn, 956 F.2d at 1454. Receivers, on the other hand, are empowered to liquidate and wind up the affairs of an institution. H.R.Conf Rep. No.101-209, 101st Cong., 1st Sess. 398 (1989). Consistent with these different roles, the value of an asset to the FDIC or RTC might vary significantly depending on whether either entity is in the role of receiver or conservator. In light of the dichotomy of purpose of the two roles, there is support for concluding that successive appointments as receiver or conservator results in a new six year statute of limitations.

Defendants also argue that the public policy against stale claims weighs in favor of concluding that there is no "stacking" of statute of limitations periods. UMLIC contends that the countervailing policy of ensuring stability of the nation's financial institutions outweighs the policy against stale claims.
Under the FDIC Act, the EDIC's sole purpose is to promote the stability of the banking system. FDIC v Isham, 782 F.Supp. 524,531 (D.Colo. 1992). Consequently, the FDIC's regulatory oversight of banks is intended to protect depositors, the insurance fund, and the public. Id. Likewise, in its receiver role, the FDIC undertakes actions only to fulfill its mandate to stabilize the banking system by protecting depositors and creditors of the failed bank and the public generally. Id. The "overarching statutory mandate" to the FDIC is to minimize loss to the insurance flind. FDIC V. Bank of Boulder, 911 F.2d 1466, 1474 (10th Cir. 1990), cert denied, 499 U.S. 904(1991).

"FIRREA's guiding light must be to further the goal of preserving and strengthening the nation's banking system and the fund insuring bank deposits." RTC v. Heisennan, 839 F.Supp 1457, 1468 (D.Colo. 1993). Indeed, speaking specifically about the FIRREA statute of limitations, the bill's sponsor stated:

[t]he provisions should be construed to maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law, claims that would otherwise have been lost due to the expiration of the applicable limitations periods.

135 Cong.Rec. 510205 (Aug. 4,1989).

Concluding that the statute of limitations is reset each time the FDIC or RTC is appointed as receiver or conservator advances this overriding goal. After consideration of the legislative history of 12 USC §§ 1821(d)(14) and (e), policy considerations, and absent pertinent case law addressing the FIRREA statute of limitations, I conclude that this action was filed within the applicable statute of limitations.

B. Alleged release agreement

In their papers, defendants imply that there exists an agreement whereby the Colorado deed of trust would be released upon payment of less than the fill amount due under the Note. Assuming for purposes of analysis that this issue is properly before me, this defense is barred by 12 USC § 1823(e), which codified the D'Oench doctrine. This doctrine provides that no agreement which tends to diminish or defeat the interest of the FDIC in a promissory note, shall be valid unless:

A) the agreement is in writing;

B) the writing was executed contemporaneously with the Note;

C) the written agreement was approved by the bank's board of directors or loan committee, and approva] is reflected in the bank's records, and

D) the written agreement has been continuously maintained as an official record of the bank.

D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447(1942).

In this case, it is uncontested that the promissory note is unpaid. There is no evidence of intent to release the defendants or otherwise forgive the indebtedness. Thus, as a matter of law, defendants' contention that the deed of trust was intended to secure only $10,000 against the Vail property is without merit.

It is undisputed that the Note was not paid on June 20, 1988, the extended maturity date, and that no payment has ever been made by any person. Having decided that the plaintiffs' claim is not barred by the FIRREA statute of limitations, UMLIC is entitled to summary judgment. Accordingly, IT IS ORDERED that:

1. plaintiff's motion for summary judgment is GRANTED;

2. defendants' cross-motion for summary judgment is DENIED;

In THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No.96-8-2495

The undersigned certifies that a copy of the foregoing

Memo opinion & order was served on May 13,1998, by;

(X) delivery to;

U~S, Marshal

Magistrate Judge Bruce D. Pringle

(N) depositing the same in the United States mail, postage prepaid, addressed to;

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Tenth Circuit
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Patrick J. Fisher, Jr.
Clerk

Elisabeth A. Shumaker
Chief Deputy Clerk

March 24, 1999

TO: ALL RECIPIENTS OF THE OPINION

RE: 98-1193, 98-1228 UMLIC-NINE Corp. v. Waring
Filed on February 16, 1999

The court's slip opinion filed in this case contains a typographical error on page 12, first sentence of the first full paragraph. The sentence should read as follows:

We conclude that the congressional intent is best served by resetting the statute of limitations on the Note at the point when the RTC became receiver for Old Sunbelt, even though the FDIC previously held the Note as receiver for Federated.

A copy of the corrected page 12 is attached for your convenience.

Sincerely,
Patrick Fisher, Clerk of Court

Keith Nelson
Deputy Clerk

encl.

PUBLISH

UNITED STATES COURT OF APPEALS

Tenth Circuit

UMLIC-NINE CORPORATION,
a North Carolina corporation,

Plaintiff- Appellee,

V.

LIAN SPRINGS DEVELOPMENT CORPORATION, a Texas corporation; JOSEPH T. WARING; MELINDA P. WARING; WARING CHILDREN'S IRREVOCABLE TRUST; KAREN SHEAFFER, as public trustee of Eagle County, Colorado and all occupAnts or other unknown persons who claim any interest in the subject matter of this action,

No.98-1228

Defendants,

and

RICHARD S. WARING,

Defendant - Appellant.

FILED
United States of Court Appeals
Tenth Circuit

FEB 16 1999
PATRICK FISHER
Clerk

No.98-1228

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 96-B-2495)

Submitted on the briefs:
Don H. Meinhold of Vaglica & Meinhold, L.L.C., Colorado Springs, Colorado, and Max L. Lieberman of Max L. Lieberman & Associates, Fort Washington, Pennsylvania, for Plaintiff-Appellee.

Joseph T. Waring, Melinda P. Waring, and Richard S. Waring, pro se.

Before **TACHA**, **BARRETT**, and **MURPHY**, Circuit Judges.

BARRETT, Circuit Judge.

Defendants-appellants Joseph T. Waring, Melinda P. Waring, and Richard S. Waring appeal from the district court's order granting summary judgment to plaintiff-appellee UMLIC-Nine Corporation (UMLIC) on UMLIC's complaint for judgment in rem against property located in Eagle County, Colorado. *See UMLIC-Nine Corp. v. Lipan Springs Dev. Corp.*, 5 F. Supp. 2d 1152 (D. Colo. 1998) (order granting summary judgment). We affirm.[1]

The following facts are undisputed. On June 20, 1986, Lipan Springs Development Corporation (Lipan Springs), a Texas corporation, executed and delivered a promissory note (Note) payable to Federated Savings and Loan Association (Federated) in the original principal amount of $250,000. As partial security for

1 After examining the briefs and applellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

the Note, appellants executed a deed of trust encumbering a condominium unit located in the Booth Falls Mountain Homes condominium development in Eagle County, Colorado (Colorado property). Lipan Springs further secured the note by executing a deed of trust encumbering a property in Travis County, Texas (Texas property).

Initially, the Note was to become due and payable in full on June 20, 1987. By written agreement executed effective June 20, 1987, the term of the Note was extended to June 20, 1988, with all remaining principal and interest due on that date. Lipan Springs defaulted on the Note and deed of trust, as extended, by failing to pay the principal and interest due June 20, 1988. The Note remains unpaid.

On August 19, 1988, the Federal Home Loan Bank Board (FHLBB) declared Federated, the obligee on the Note, insolvent. The FHLBB appointed the Federal Deposit Insurance Corporation (FDIC), acting through the Federal Savings and Loan Deposit Insurance Corporation (FSLIC), receiver for Federated. Acting as receiver, the FSLIC then transferred Federated's assets, including the Note, to Sunbelt Savings, FSB (Old Sunbelt).

Old Sunbelt subsequently failed. On April 25, 1991, the director of the Office of Thrift Supervision (OTS) appointed the FDIC, acting through the Resolution Trust Corporation (RTC), receiver for Old Sunbelt. On the same date, the OTS chartered a new institution, Sunbelt Savings, FSB (New Sunbelt); transferred to it all of Old Sunbelt's assets, including the Note; and appointed the RTC conservator for New Sunbelt. On April 9, 1992, the OTS replaced the RTC as conservator for New Sunbelt by appointing RTC receiver for New Sunbelt.

In 1995, UMLIC's predecessor in title acquired the Note and the deeds of trust were assigned to UMLIC on February 22, 1996. UMLIC filed this action for UMLIC on its complaint, rejecting appellants' argument that this action is barred by the statute of limitations.

Summary judgment is apporpritatie "if the pleadings. depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the district court's grant of summary judgment de novo, applying the same standard as it applied. See McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998). This standard requires us to examine the record in order to determine whether any genuine issue of material fact was in dispute; if not, we determine whether the district court correctly applied the substantive law. See id. In doing so we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion. See id. Where the nonmovant will bear the burden of proof at trial on a dispositive issue, however, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence,
as a triable issue, of an element essential to that party's case in order to survive summary judgment. See id.

I.

Appellants first argue that this action is barred by the federal statue of limitations applicable to actions brought by FDIC or RTC[2] as conservator or receiver, established by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA). See 12 U.S.C. ß 1821(d)(14). That statute reads in pertinent part as follows:

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be-

2 The statute refers to the FDIC (the "Corporation"); however, it is also applicable to the RTC. "Congress gave the RTC all of the receivership and conservatorship powers it granted the FDIC." RTC v CedarMinn Bldg. Ltd. Partnership, 956 F.2d 1446, 1450 n.5 *8th Cir. 1992).

(I) in the case of any contract claim, the longer of-

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law[.]. . .
(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of-

(I) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

The Fifth Circuit has adopted a two-step analysis to be used in determining whether this statute bars an action by the RTC. See FDIC v. Barton, 96 F.3d 128, 132 (5th Cir. 1996).

This analysis is consistent with our cases, see FDIC v. Regier Carr & Monroe, 996 F.2d 222, 225 (10th Cir. 1993), and we will apply it here. Under this analysis, we ask first whether the claims brought by RTC or its assignee[3] were viable under the state limitations statute at the time the RTC became receiver. See Barton, 96 F.3d at 132. The four-year Texas statute of

3 As the private assignee of an obligation in default from the RTC, UMLIC stepped into its shoes and received the benefit of the six-year FIRREA statute of limitations. See Cadle CO. v. 1007 Joint Venture, 82 F.3d 102, 105 (5th Cir. 1996).

limitations[4] did not expire until June 1992 and was therefore still running when the FDIC or RTC became receiver for each of the institutions involved here. See Tex. Civ. Prac. & Rem. Code ß 16.004(a)(3) (West 1986). Thus, regardless of which receivership applies, UMLIC has met the first criterion for timeliness.

We next ask whether FIRREA's six-year statute of limitations has run. See Barton, 96 F.3d at 132. Appellants contend that it began running no later than August 19, 1988, the date the FDIC was appointed receiver for Federated, and therefore expired in August 1994. The district court concluded, however, based upon its analysis of the statute, that the limitations period was reset when the RTC became receiver for Old Sunbelt and that the six-year statute therefore did not begin to run until at least April 25, 1991. See UMLIC-Nine, 5 F. Supp. 2d at 1158-59.

We review the district court's analysis of the statute de novo. See Dalton v. IRS, 77 F.3d 1297, 1299 (10th Cir. 1996). "When interpreting a statute, we first examine the statutory language itself. If unambiguous statutory language is not defined, we give the language its common meaning, provided that the result is not absurd or contrary to the legislative purpose." Id. (citations omitted). Section 1821(d) contains no language specifying whether a subsequent appointment resets the limitations period. Appellants draw our attention to dicta in FDIC v. Bledsoe, 989 F.2d 805 (5th Cir. 1993), subsequently cited in Legal Econometrics, Inc. v. Chama Land & Cattle Co. (In re Legal Econometrics, Inc.), 169 B.R. 876, 885 (Bankr. N.D. Tex. 1994), to support their position that stacking of the FIRREA statute of limitations as sought by UMLIC is prohibited. We do not find these cases persuasive.

4 The parties have proceeded as though the note were governed by the Texas statute of limitations. As the district court noted, the Colorado statute of limitations also had not yet run at the time RTC was appointed reveiver for Old Sunbelt. See Colo. Rev. Stat. § 13-80-103.5(1)(a). The choice of law issue is therefore immaterial to the outcome of this case.

In Bledsoe, the principal issue was whether the assignee of a note from the FDIC was entitled to assert FIRREA's six-year statute of limitations. In that case, the FSLIC obtained a note on December 19, 1985, when it was appointed receiver of an insolvent institution. The FSLIC assigned the note to a savings and loan which subsequently failed, and the note returned to the FSLIC on August 26, 1988. The Fifth Circuit held that the FDIC timely filed its complaint on the note on December 18, 1991, within the limitations period. In a footnote, the court further stated the following:

> The appropriate date of receivership is December 19, 1985, the date of the first receivership, not August 26, 1988, the date of the second receivership. To prevent the possibility of an infinite period of limitations the FDIC cannot receive a new six year period every time it re-receives a note. Having received the benefit of the federal six year statute on a given note, the FDIC cannot gain an additional six years by assigning the note to a private party and then receiving it again.

Bledsoe, 989 F.2d at 811 n.8.

This statement from Bledsoe is dicta. See Rohrbaugh v. Celotex Corp., 53 F.3d 1181, 1184 (10th Cir. 1995) ("Dicta are 'statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.'") (quoting Black's Law Dictionary 454 (6th ed. 1990)). The dicta is unsupported by citation to relevant authority or statutory analysis. We do not find it persuasive. In Legal Econometrics, the bankruptcy court relied on the Bledsoe dicta, without independent analysis. See 169 B.R. at 885.

Other than these two cases, which we find unpersuasive, we have located no case law which directly addresses the issue here. We move on, therefore, to consideration of the purpose and scope of FIRREA's statute of limitations and the legislative intent revealed in its statutory history. See State Ins. Fund v. Southern

Star Foods, Inc. (In re Southern Star Foods, Inc.), 144 F.3d 712, 715 (10th Cir.), cert. denied, 119 S. Ct. 438 (1998).

Congress enacted FIRREA in response to the "precarious financial condition of the nation's banks and savings and loan institutions." RTC v. Love, 36 F.3d 972, 975 (10th Cir. 1994) (quoting Henderson v. Bank of New England, 986 F.2d 319, 320 (9th Cir. 1993)). FIRREA grants broad powers to the RTC "to deal expeditiously with failed financial institutions." Id. The FDIC, and consequently the RTC, is empowered to merge insolvent institutions into other insured institutions; to transfer the assets and liabilities of insolvent institutions to other institutions; and, with approval of the OTS, to organize new institutions to take over assets and liabilities of insolvent institutions. See ß 1821(d)(2)(F), (G).

Senator Donald Riegle, the sponsor of FIRREA, stated that its statute of limitations provisions "should be construed to maximize potential recoveries by the Federal Government by preserving to the greatest extent permissible by law claims that would otherwise have been lost due to the expiration of hitherto applicable limitations periods." 135 Cong. Rec. S10205 (daily ed. Aug. 4, 1989) (statement of Sen. Riegle). In interpreting a statute, we accord substantial weight to statements by its sponsors concerning its purpose and scope. See Federal Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

The legislative history and purpose of FIRREA both weigh in favor of granting the RTC the benefit of a reset statute of limitations. Appellants argue, however, echoing the Bledsoe dicta, that resetting the statute of limitations would allow the RTC to receive an infinite number of six-year limitations periods by successively assigning notes to one insolvent institution after another. They contend this runs afoul of the purposes of statutes of limitation, which are to insure finality and to prevent the assertion of stale claims. See Jobin v. Boryla (In re M & L Bus. Mach. Co., 75 F.3d 586, 590 (10th Cir. 1996).

We decide here only that the statute of limitations may be

reset if a subsequent receivership occurs while the state statute of limitations continues to run.

We express no opinion concerning the effect of a subsequent receivership outside the state statute of limitations period, and leave that question for another day. Since our holding is delimited in this fashion, the theoretical problem appellants raise concerning "infinite" extensions of the statute of limitations is inapplicable.

We conclude that the congressional intent is best served by resetting the statute of limitations on the Note at the point when the RTC became receiver for Old Sunbelt, even though the FDIC previously held the Note as receiver for Federated. The statute of limitations under ß 1821(d)(14) therefore recommenced on April 25, 1991, and this action was timely.[5]

II.

Appellants next argue that an agreement exists whereby the deed of trust on the Colorado property would be released upon payment of only $10,000. They have failed to supply evidence of the alleged agreement sufficient to satisfy the requirements of the D'Oench, Duhme doctrine.[6] See D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). That doctrine, now codified at 12 U.S.C. ß 1823(e), provides that no agreement which tends to diminish or defeat the interest of the FDIC in a promissory note

5 There is also an argument that the statute of limitations was reset when RTC became receiver for New Sunbelt on April 9, 1992; however, as the action was timely based on the receivership of Old Sunbelt, we need not decide that question.

shall be valid unless (1) the agreement is in writing; (2) the writing was executed contemporaneously with the note; (3) the written agreement was approved by the bank's board of directors or loan committee, and that approval is reflected in the bank's records; and (4) the written agreement has been continuously maintained as an official record of the bank. D'Oench, Duhme applies to actions brought by FDIC's assignees as well as by FDIC itself.
See National Enters., Inc. v. Smith, 114 F.3d 561, 564 (6th Cir. 1997). Since appellants failed to provide evidence of the alleged agreement sufficient to satisfy D'Oench, Duhme, the district court properly granted summary judgment for UMLIC on this defense.

The judgment of the United States District Court for the District of Colorado is AFFIRMED.

6 Two settlement statements prepared in connection with this transaction do appear in the record. The first reflects a loan amount of $10,000 and identifies the Colorado property as the hypothecated property. The second reflects a loan amount of $240,000 and identifies the Texas property as the hypothecated property. The statements do not satisfy the requirements of D'Oench, Duhme.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UMLIC-NINE CORPORATION, a North Carolina corporation,

Plaintiff-Appellee,

v.

LIPAN SPRINGS DEVELOPMENT CORPORATION, a Texas corporation; JOSEPH T. WARING; MELINDA P. WARING; WARING CHILDREN'S IRREVOCABLE TRUST; KAREN SHEAFFER, as public trustee of Eagle County, Colorado, and all occupants or other unknown persons who claim any interest in the subject matter of this action,

Defendants,

and

RICHARD S. WARING,

Defendant-Appellant.

Nos. 98-1228

ORDER

Filed April 15, 1999

Before TACHA, BARRETT and MURPHY, Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P.35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by "s/ _____
Deputy clerk

Supreme Court, U.S.
FILED
OCT 15 1999
OFFICE OF THE CLERK

No. 99-486

IN THE

Supreme Court of the United States

RICHARD S. WARING, JOSEPH T. WARING, MELINDA P. WARING,

Petitioners,

v.

UMLIC-NINE CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit correctly hold that the six-year statute of limitations of 12 U.S.C. § 1821(d)(14) began to run when the Resolution Trust Corporation was appointed receiver of Sunbelt Savings, FSB, on April 9, 1992?

2. Did the United States District Court for the District of Colorado and the United States Court of Appeals for the Tenth Circuit correctly hold that summary judgment in favor of plaintiff was proper because the appellants' defense of an alleged release agreement failed under 12 U.S.C. § 1823(e) and *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*, 315 U.S. 447, 62 S. Ct. 910, 86 L. Ed. 2d 1224 (1942)?

STATEMENT PURSUANT TO RULE 29.6

UMLIC-NINE Corp. is a wholly owned subsidiary of United Mortgage and Loan Investment Corporation, a North Carolina corporation. There is no publicly held corporation which owns ten percent or more of any corporation which is a party to this action or a parent thereof.

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STATEMENT OF THE CASE

Respondent UMLIC-NINE Corp. ("UMLIC") is the current holder of a Promissory Note ("Note") dated June 20, 1986, executed by Richard S. Waring, as President of Lipan Springs Development Corporation ("Lipan Springs"), a Texas Corporation, in the original principal amount of $250,000. The Note was originally payable to the order of Federated Savings and Loan Association ("Federated Savings"). Two deeds of trust were given to secure payment of the Note. One deed of trust encumbered property in the State of Texas. The other, dated June 20, 1986, was executed by Joseph T. Waring, Melinda F. Waring and Richard S. Waring (collectively, the "Warings") and encumbered a condominium unit in Vail, Colorado ("Colorado Deed of Trust"). On June 20, 1987, Lipan Springs entered into a Modification and Extension of Promissory Note and Deed of Trust which extended the maturity date of both the Note and the Colorado Deed of Trust to June 20, 1988.

The Note was not paid on the maturity date, as extended, and thereafter was in default. No payment has ever been made on the Note by Lipan Springs, any guarantor, or any other person.

On August 19, 1988, Federated Savings failed, the Federal Savings and Loan Insurance Corporation ("FSLIC") was appointed as its receiver, and it then assigned Federated's assets to Sunbelt Savings, FSB ("Old Sunbelt"). FSLIC was replaced as receiver by the Resolution Trust Corporation ("RTC") when Congress enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. §§ 1821, *et seq*. On or about April 25, 1991, while the four year Texas statute of limitations was still running, Old

Sunbelt, the owner of the loan, failed, and the Office of Thrift Supervision ("OTS") appointed the RTC as its Receiver. The OTS chartered a new institution, Sunbelt Federal Savings, FSB ("New Sunbelt"), and the RTC was appointed as Conservator for New Sunbelt the same day. On April 9, 1992, New Sunbelt was resolved, and the RTC was appointed as its receiver, thereby succeeding to its assets pursuant to 12 U.S.C. § 1821(d)(2)(A)(ii). The Note and Colorado Deed of Trust were assigned by the RTC as Receiver for New Sunbelt to Summatyme Corporation, UMLIC's successor in title, in June, 1995.

UMLIC commenced this action seeking foreclosure of the Colorado Deed of Trust on October 25, 1996. Only the Warings answered, denying liability based upon expiration of the applicable statute of limitations, and an alleged "release agreement". The "release agreement" was not contained in the loan documents nor referred to in any of Lipan Spring's corporate resolutions authorizing the loan. The Warings were not able to produce a copy of that agreement, or any other evidence at all that the agreement ever existed.

Because it was uncontested that the Note was never paid, the district court found that there were no genuine issues of material fact to be determined and that UMLIC was entitled to judgment as a matter of law. In its opinion, the district court analyzed Section 1821(d)(14), the public policy that supported it and the parallelism between it and Section 1821(e), and concluded "that the statute of limitations is reset each time the FDIC or RTC is appointed as receiver or conservator" of a failed financial institution, *UMLIC-NINE Corporation v. Lipon Springs Development Corporation*, 5 F. Supp. 2d 1152, 1158-59 (D. Co. 1998). The court also

held that the contention that the Colorado Deed of Trust was intended to secure only $10,000 was without merit because there was "no evidence to release the defendants or otherwise forgive the indebtedness", *id.* at 1159.

The court of appeals affirmed, but found it unnecessary to reach the question of whether the statute of limitations was reset when the RTC became receiver for New Sunbelt because "the action was timely based on the receivership of Old Sunbelt." *UMLIC-NINE Corporation v. Lipon Springs Development Corporation*, 168 F.3d 1173, 1179 (10th Cir. 1999).

REASONS FOR DENYING THE WRIT

I.

THIS DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

The Warings incorrectly assert that this decision conflicts with a decision of the United States Court of Appeals for the Fifth Circuit, *FDIC v. Bledsoe*, 989 F.2d 805 (5th Cir. 1993). In *Bledsoe*, the FDIC, as receiver for a failed institution to whom FSLIC had assigned a note and guarantee after the original lender failed, sued on a guaranty, relying on the six year federal statute of limitations because the four year Texas statute had expired. The sole issue in *Bledsoe,* according to the court of appeals, was "whether the six year period of limitations enjoyed by the FSLIC was transferred to Federal Savings upon the assignment of the note by the FSLIC to Federal Savings." 989 F.2d at 809. The court held that "Federal Savings, as the assignee, stood in the shoes of the FSLIC, the assignor, and thus received the FSLIC's six year period of limitations." *Id.* at 810. Only in dictum, in footnote

8, did the court state: "To prevent the possibility of an infinite period of limitations the FDIC cannot receive a new six year period every time it receives a note." *Id.* at 811 n.8. However, as is clear from the accompanying textual discussion, because the FDIC's action was timely with reference to the first receivership, it was not necessary for the court to determine whether the statute began to run again upon the commencement of the second receivership. *Id.* at 811-12.

On the other hand, the decision of the court of appeals is consistent with the dictum found in *RTC v. Cedarminn Building Limited Partnership*, 956 F.2d 1446 (8th Cir. 1992). The issue presented in that case was whether the RTC's right to repudiate burdensome contracts was reinstated when it succeeded itself as conservator or receiver of the same institution. In analyzing the disjunctive structure of 12 U.S.C. § 1821(e), the court stated:

> Throughout FIRREA, Congress specifically articulated when the Corporation was to exercise a duty, right or power in its capacity as a "conservator or receiver."[8] In each instance, it is clear that Congress intended the duty, right or power to be enjoyed or exercised by both the conservator and the receiver. It stretches credibility to assume Congress intended any of rights to be forfeited in instances when the Corporation preceded itself as conservator or receiver of an institution.

956 F.2d at 1451-2 (footnote 8 omitted). In footnote 8, the court catalogued every instance in FIRREA in which the phrase "conservator or receiver" appeared, including ". . . § 1821(d)(14) establishes the statute of limitations for claims brought by the Corporation as 'conservator or receiver' . . . ." 956 F.2d at 1451 n.8. In reaching its conclusion, the court then compared this

structure with all of the instances in which the power, right or duty was limited to the RTC in only one of its capacities. *See id.* at 1452 n.9 and accompanying text.

Because no other circuit has ruled on the precise issue decided by the United States Court of Appeals for the Tenth Circuit, there is no conflict among the circuit courts of appeals.

II.

THE WARINGS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED.

The Warings appear to argue that because the decision of the court of appeals extended the statute of limitations, their constitutional rights were violated because the alleged "release agreement" may have been lost by UMLIC, its precedessors in title, the RTC, the FDIC, the FSLIC or someone other than themselves.

In the first instance, there is absolutely no evidence in this case that the alleged "release agreement" ever existed, other than the Warings' bald assertions to that effect. Second, there is no evidence that had such document existed, it was lost by UMLIC or some other entity in its chain of title, and third, there is no evidence that had the suit been brought earlier, the document could have been produced. Finally, the Warings never attempted to tender performance under the alleged "release agreement".

In contrast, there was ample evidence that such an agreement never existed. It was not referenced in any of the loan documents, including the Note, deeds of trust, guaranties, corporate resolutions, closing affidavits, and the extension agreement. UMLIC responded to discovery

requests by stating under oath that the document did not exist in any of the files it received from the RTC, and offered to make all of such files available for the Warings' inspection in North Carolina. The Warings declined this opportunity. Furthermore, they did not exert any effort to obtain any of the minutes of the board of directors or of the loan committee of Federated Savings, the original lender, which should have referenced the approval of such an agreement, if it in fact actually existed.

The judicial doctrine expounded in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942) and the legislative provision of 12 U.S.C. § 1823(e) are both designed to protect the assets of failed institutions from secret agreements which would diminish their values. Under either, the party asserting the existence of the agreement has the burden of proving that the agreement existed in writing, that it was executed contemporaneously with the obligation, that its approval by the institution's board or loan committee is reflected in the institution's records, and that it has been continuously maintained as a record of the institution. The Warings failed to establish even one of the necessary elements, and did not advance any evidence that they could have done so at an earlier time.

Accordingly, the Warings' constitutional right to due process of law was not violated by either the district court or the court of appeals.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari in this case should be denied.

Respectfully submitted,

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